

FILED

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO UNIFIED PORT
DISTRICT,

CASE NO. 15-cv-00022-WQH-
JLB

Plaintiff,

ORDER

vs.

UNDERWRITERS AT LLOYD'S,
LONDON AND OTHER LONDON
MARKET INSURERS; NORTH
PACIFIC INSURANCE COMPANY,
LTD.,

Defendants.

NORTH PACIFIC INSURANCE
COMPANY,

Counterclaimant,

vs.

SAN DIEGO UNIFIED PORT
DISTRICT,

Counter-Defendant.

HAYES, Judge:

The matter before the Court is the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e) ("motion to dismiss the Counterclaim for Reimbursement") (ECF No. 25) filed by Plaintiff and Counter-Defendant San Diego Unified Port District.

I. Background

On January 6, 2015, Plaintiff San Diego Unified Port District commenced this action by filing the Complaint in this Court against Defendants Underwriters at Lloyd's

1 London and Other London Market Insurers (“Lloyd’s”) and North Pacific Insurance
 2 Company, Ltd. (ECF No. 1). On March 5, 2015, North Pacific Insurance Company
 3 (“North Pacific”) appeared in this action, filing a motion for a more definite statement.¹
 4 (ECF No. 6). On March 26, 2015, Plaintiff filed the First Amended Complaint
 5 (“FAC”), which is the operative complaint in this case. (ECF No. 12). On March 27,
 6 2015, the Court issued an Order, denying North Pacific’s motion for a more definite
 7 statement as moot. (ECF No. 14). On May 28, 2015, Defendant Lloyd’s filed an
 8 answer. (ECF No. 21). On May 28, 2015, Defendant North Pacific filed an answer and
 9 Counterclaim for Reimbursement against Plaintiff. (ECF No. 20).

10 On June 22, 2015, Plaintiff filed the motion to dismiss the Counterclaim for
 11 Reimbursement, accompanied by a declaration and two exhibits. (ECF No. 25). On
 12 July 13, 2015, Defendant North Pacific filed an opposition (ECF No. 29), accompanied
 13 by a request for judicial notice (ECF No. 30). On July 20, 2015, Plaintiff filed a reply,
 14 accompanied by a request for judicial notice. (ECF No. 33).

15 **II. Allegations of the FAC**

16 The FAC alleges that North Pacific entered into insurance policies, Policy Nos.
 17 85CB1004 (9-1-85 to 9-1-87), with non-party Campbell Industries, Inc. (“Campbell”),
 18 which agreed to “defend the Port against property damage liability claims arising out
 19 of an occurrence....” (ECF No. 12 at 4). In 2004, the California Regional Water
 20 Quality Control Board (“the Regional Board”) issued Investigative Order No. R9-2004-
 21 0027, requiring Plaintiff to “prepare and submit a technical report to the Regional
 22 Board regarding contaminated marine sediment in the San Diego Bay” at the National
 23 Steel & Shipbuilding Company Shipyard Sediment Site (“the Site”). *Id.* at 5. In 2009,
 24 the City of San Diego filed a lawsuit against Plaintiff and other parties in the Southern
 25

26 ¹ According to North Pacific, North Pacific and North Pacific Insurance Company, Ltd.
 27 are distinct and unrelated entities. (ECF No. 20 at 18). North Pacific is a company organized
 28 under the laws of Oregon, and North Pacific Insurance Company, Ltd. is a company organized
 under the laws of Bermuda. *Id.* North Pacific appears in this action as “Defendant North
 Pacific Insurance Company ... sued erroneously as North Pacific Insurance Company, Ltd....”
Id. at 2.

1 District, and other parties filed cross-claims against Plaintiff (“the Shipyard Suit”). In
 2 2012, the Regional Board ordered Plaintiff to take “corrective actions necessary to
 3 remediate the contaminated marine bay sediment” at the Site. *Id.*

4 Plaintiff “timely tendered the Shipyard Suit to North Pacific, along with written
 5 requests that North Pacific defend and indemnify the Port pursuant to the provisions
 6 of the North Pacific Policies.” *Id.* at 6. In April 2012, Defendant North Pacific agreed
 7 to defend Plaintiff in the Shipyard Suit, subject to a reservation of rights. “North
 8 Pacific has failed to fully defend the Port in the Shipyard Suit pursuant to the Port’s
 9 North Pacific Policies.” *Id.*

10 The FAC asserts eight claims for relief, and three claims against Defendant
 11 North Pacific: (1) declaratory relief; (2) breach of contract; and (3) bad faith and the
 12 breach of the implied covenant of good faith and fair dealing. Plaintiff requests a
 13 declaration that the North Pacific policies obligate Defendant North Pacific “to fully
 14 defend and reimburse the Port and to pay in full on the Port’s behalf all defense fees,
 15 costs and expenses related to the Shipyard Suit.” *Id.* at 16. Plaintiff requests
 16 compensatory, consequential, exemplary, and punitive damages, attorneys’ fees, costs,
 17 interest, and future costs from Defendant North Pacific.

18 **III. Allegations of the Counterclaim for Reimbursement**

19 Defendant North Pacific is an insurance company incorporated under Oregon
 20 law. North Pacific Insurance Company, Ltd. is a Bermuda corporation. Defendant
 21 North Pacific was unaware of North Pacific Insurance Company, Ltd.’s existence until
 22 April 2015. North Pacific Insurance Company, Ltd. insured Campbell from 1985 until
 23 1987, “under Policy Nos. 85CB1004 and 86CB1004.” (ECF No. 20 at 18). When
 24 Plaintiff tendered defense in the Shipyard Suit, Plaintiff tendered the defense to
 25 Defendant North Pacific instead of North Pacific Insurance Company, Ltd.

26 “North Pacific accepted tender of the Shipyard Suit, in a situation where North
 27 Pacific reasonably believed the actual policy or policies of insurance to be lost, subject
 28 to and expressly conditioned on North Pacific’s full reservation of rights to deny

1 coverage.” *Id.* at 18. Defendant North Pacific has been defending Plaintiff since 2012
 2 and paying 6.6% share of Plaintiff’s invoices, for a total of \$129,525.96. “On April 22,
 3 2015, shortly after North Pacific learned it owed no obligations to the Port, North
 4 Pacific demanded repayment of this \$129,525.96 sum.” *Id.* at 19.

5 The Counterclaim for Reimbursement asserts one claim for relief: reimbursement
 6 of Defense Fees and Costs against the Port. Under the heading “First Cause of Action”
 7 for “Reimbursement of Defense Fees and Costs against the Port,” the Counterclaim
 8 alleges, “North Pacific is entitled to recovery of the \$129,525.96 on the theories of
 9 restitution, unjust enrichment, quasi-contract, and/or reimbursement under *Buss v.*
 10 *Superior Court*, 16 Cal. 4th 35 (1997).” *Id.* at 20. The Counterclaim requests
 11 judgment in Defendant North Pacific’s favor, reimbursement, costs, and attorneys’ fees.

12 **IV. Motion to Dismiss**

13 **A. Rule 12(b)(6) Standard**

14 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state
 15 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of
 16 Civil Procedure 8(a) provides that “[a] pleading that states a claim for relief must
 17 contain ... a short and plain statement of the claim showing that the pleader is entitled
 18 to relief.” Fed. R. Civ. P. 8(a)(2). “A district court’s dismissal for failure to state a
 19 claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a ‘lack of a
 20 cognizable legal theory or the absence of sufficient facts alleged under a cognizable
 21 legal theory.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011)
 22 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

23 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
 24 requires more than labels and conclusions, and a formulaic recitation of the elements
 25 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
 26 (quoting Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must
 27 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
 28 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,

1 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
2 content that allows the court to draw the reasonable inference that the defendant is
3 liable for the misconduct alleged.” *Id.* (citation omitted). “[T]he tenet that a court must
4 accept as true all of the allegations contained in a complaint is inapplicable to legal
5 conclusions. Threadbare recitals of the elements of a cause of action, supported by
6 mere conclusory statements, do not suffice.” *Id.* (citation omitted). “When there are
7 well-pleaded factual allegations, a court should assume their veracity and then
8 determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679. “In
9 sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content,
10 and reasonable inferences from that content, must be plausibly suggestive of a claim
11 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.
12 2009) (quotations and citation omitted).

13 **B. Contentions of the Parties**

14 Plaintiff moves to dismiss Defendant North Pacific’s Counterclaim on the
15 ground that Defendant North Pacific was required to submit a written claim to Plaintiff
16 pursuant to California’s Tort Claims Act (“CTCA”), California Government Code §§
17 900, *et seq.*, prior to filing the Counterclaim for Reimbursement because Plaintiff is a
18 public agency. Plaintiff asserts that Defendant did not comply with the written claim
19 requirement. Plaintiff contends that the Counterclaim contains no allegations
20 demonstrating that Defendant North Pacific complied with the written claim
21 requirement, or that Defendant North Pacific should be excused from complying.
22 Plaintiff submits an April 22, 2015 letter from Defendant North Pacific’s counsel to
23 Plaintiff’s counsel and contends that the April 22, 2015 letter does not satisfy the
24 CTCA’s written claim requirement.

25 Defendant North Pacific contends that two exceptions to the written claim
26 requirement apply to this case. First, Defendant North Pacific contends that it is not
27 required to submit a written claim pursuant to the CTCA because Plaintiff is not listed
28 on the California Secretary of State’s Roster of Public Agencies. Defendant North

1 Pacific requests judicial notice of a “California Secretary of State Certificate of No
 2 Record re: the San Diego Unified Port District.” (ECF No. 30 at 2). Second,
 3 Defendant North Pacific contends that the written claim requirement “does not apply
 4 to a defendant’s counterclaims against a government-entity plaintiff that relate[s] to the
 5 same set of facts that are alleged in the government-plaintiff’s complaint.” (ECF No.
 6 29 at 10).

7 With respect to the first exception, Plaintiff contends that Defendant North
 8 Pacific is still required to submit a written claim because Plaintiff satisfied its
 9 obligation to file a statement with the Secretary of State to be placed on the Roster of
 10 Public Agencies. Plaintiff asserts that the failure to list Plaintiff on the Roster of Public
 11 Agencies is the Secretary of State’s fault, not Plaintiff’s fault. Plaintiff requests
 12 judicial notice of filings it submitted to the Secretary of State to be listed on the Roster
 13 of Public Agencies.

14 With respect to the second exception, Plaintiff contends that the second
 15 exception raised by Defendant North Pacific only applies to a “cross-action against a
 16 cross-defendant and raises the issue of relative liability among the public entity and the
 17 defendant in a third-party lawsuit.” (ECF No. 33 at 5). Plaintiff contends that
 18 Defendant North Pacific’s Counterclaim and Plaintiff’s FAC “arise out of very
 19 different factual and legal circumstances.” *Id.* at 4.

20 **C. Requests for Judicial Notice**

21 Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a
 22 fact that is not subject to reasonable dispute because it ... is generally known within the
 23 trial court’s territorial jurisdiction; or ... can be accurately and readily determined from
 24 sources whose accuracy cannot reasonably be questioned.” Fed R. Evid. 210(b).
 25 “[U]nder Fed. R. Evid. 201, a court may take judicial notice of ‘matters of public
 26 record.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (quoting *Mack*
 27 *v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir.1986)).

28 Defendant North Pacific requests judicial notice of a “California Secretary of

1 State Certificate of No Record re: the San Diego Unified Port District.” (ECF No. 30).
2 Plaintiff does not object. The Court takes judicial notice of the “California Secretary
3 of State Certificate of No Record re: the San Diego Unified Port District” as a matter
4 of public record.

5 Plaintiff requests judicial notice of four exhibits, all filings submitted to the
6 California Secretary of State with respect to the “Roster of Public Agencies.” (ECF
7 No. 33-1 at 2). All exhibits are file-stamped by the California Secretary of State. The
8 Court takes judicial notice of the four exhibits appearing at ECF No. 33-3 as a matter
9 of public record.

10 **D. Analysis**

11 California Government Code section 945.4 provides:

12 Except as provided in Sections 946.4 and 946.6, no suit for money or
13 damages may be brought against a public entity on a cause of action for
14 which a claim is required to be presented in accordance with Chapter 1
(commencing with Section 900) and Chapter 2 (commencing with Section
15 910) of Part 3 of this division until a written claim therefor has been
16 presented to the public entity and has been acted upon by the board, or has
been deemed to have been rejected by the board, in accordance with
Chapters 1 and 2 of Part 3 of this division.

17 Cal. Gov. Code § 945.4. Section 946.4 provides two exceptions to this requirement:

18 (a) Where provision is made by or pursuant to law that no suit may be
19 brought against a public agency as defined in Section 53050 unless and
until a claim is presented to the agency, the failure to present a claim does
20 not constitute a bar or defense to the maintenance of a suit against such
public agency if, during the 70 days immediately following the accrual of
the cause of action:

21 (1) No statement pertaining to the public agency is on file, or is placed on
22 file, in the Roster of Public Agencies in the office of the Secretary of State
and of the county clerk of each county in which the public agency then
23 maintains an office, as required by Section 53051; or

24 (2) A statement or amended statement pertaining to the public agency is
25 on file, or is placed on file, in the Roster of Public Agencies in the office
of the Secretary of State and of the county clerk of each county in which
26 the public agency then maintains an office, but the information contained
therein is so inaccurate or incomplete that it does not substantially
conform to the requirements of Section 53051.

27 (b) On any question of fact arising within the scope of paragraphs (1) and
28 (2) of subdivision (a), the burden of proof is upon the public agency.

29 *Id.* § 946.4(a), (b). Section 53051(c) provides that “[i]t shall be the duty of the

1 Secretary of State and of the county clerk of each county to establish and maintain an
 2 indexed ‘Roster of Public Agencies,’ to be so designated, which shall contain all
 3 information as required in subdivisions (a) and (b), which roster is hereby declared to
 4 be a public record.” *Id.* § 53051(c).

5 Plaintiff has submitted a judicially noticeable document from the Secretary of
 6 State, dated July 8, 2015, titled “CERTIFICATE OF NO RECORD,” and stating that
 7 the Secretary of State has “failed to find any records of a filing in this office and in
 8 accordance with California Government Code section 53051” for Plaintiff. (ECF No.
 9 30-1 at 2). The fact that Plaintiff submitted four documents to the Secretary of State
 10 pertaining to the Roster of Public Agencies between April 2013 and January 2015 does
 11 not establish that these filings were “on file, or placed on file, in the Roster of Public
 12 Agencies” during the 70 days immediately following the accrual of Defendant North
 13 Pacific’s claim. Cal. Gov. Code § 946.4(a). The Court concludes that Plaintiff has the
 14 “burden of proof” as the “public agency” and has failed to establish that a “statement
 15 pertaining to [Plaintiff] is on file, or is placed on file, in the Roster of Public Agencies”
 16 during the 70 days immediately following the accrual of Defendant North Pacific’s
 17 claim. *Id.* §§ 946.4(a), (b).

18 “[I]t is manifestly unjust to allow a State to bring a suit upon a contract and then
 19 to use what amounts to a notice statute to shield itself from a cross-complaint asserted
 20 by the defendant in the same suit and arising from that very contract. *People ex rel.*
 21 *Dep’t of Parks and Recreation v. West-A-Rama, Inc.*, 35 Cal. App. 3d 786, 794 (1973).
 22 Both the Complaint and the Counterclaim seek a determination of rights and liabilities
 23 pursuant to Policy No. 85CB1004. *See* ECF No. 12 at 4-5 (“North Pacific insured
 24 Campbell pursuant to one or more written policies of insurance in effect for all of or
 25 portions of the period from September 1, 1985 to September 1, 1987 under Policy Nos.
 26 85CB1004 (9-1-85 to 9-1-87)....”); ECF No. 20 at 18 (“Bermuda North Pacific insured
 27 Campbell Industries and certain of its affiliates ... from October 16, 1985 to September
 28 1, 1987 under Policy Nos. 85CB1004 and 86CB1004.”). Plaintiff seeks a declaration

1 that it is entitled to defense pursuant to this policy, while Defendant North Pacific
 2 seeks a judgment that Defendant has no obligations to Plaintiff pursuant to this policy
 3 and that it is entitled to reimbursement for defense costs paid under this policy. The
 4 Court concludes that Plaintiff is not entitled to “shield itself from a [counterclaim]
 5 asserted by the defendant in the same suit and arising from” the same contract upon
 6 which Plaintiff commenced this action. *West-A-Rama, Inc.*, 35 Cal. App. 3d at 794.

7 Plaintiff’s motion to dismiss pursuant to Rule 12(b)(6) is denied.

8 **V. Motion for a More Definite Statement**

9 Plaintiff moves for a more definite statement pursuant to Rule 12(e) on the
 10 ground that Plaintiff is unable to ascertain Defendant North Pacific’s legal theories.
 11 Plaintiff contends that Defendant North Pacific’s reimbursement claim is vague
 12 because one of the supporting allegations for that claim states that Defendant North
 13 Pacific is entitled to recovery under restitution, unjust enrichment, quasi-contract, and
 14 reimbursement theories.

15 Defendant North Pacific contends that the Counterclaim for Reimbursement sets
 16 forth all key facts. Defendant North Pacific contends that Plaintiff only objects to one
 17 paragraph as vague, paragraph 115. Defendant North Pacific contends that there is
 18 nothing improper about paragraph 115.

19 Federal Rule of Civil Procedure 12(e) provides that a party may move for a more
 20 definite statement for a pleading that is “so vague or ambiguous that the party cannot
 21 reasonably prepare a response.” Fed. R. Civ. P. 12(e). A Rule 12(e) motion “must
 22 point out the defects complained of and the details desired.” *Id.*

23 The Counterclaim for Reimbursement contains factual allegations and a single
 24 claim for reimbursement. Paragraph 115 states that “North Pacific is entitled to
 25 recovery of the \$129,525.96 on the theories of restitution, unjust enrichment, quasi-
 26 contract, and/or reimbursement under *Buss v. Superior Court*, 16 Cal. 4th 35 (1997).”
 27 (ECF No. 20 at 20).

28 *Buss* held that an insurer may seek “reimbursement” from the insured when it

1 assumes defense for claims that are “not even potentially covered.” *Buss*, 16 Cal. 4th
2 at 50. *Buss* explained:

3 The insurer therefore has a right of *reimbursement* that is implied in law
4 as *quasi-contractual*, whether or not it has one that is implied in fact in
5 the policy as contractual. As stated, under the law of *restitution* such a
right runs against the person who benefits from “*unjust enrichment*” and
in favor of the person who suffers loss thereby.

6 *Id.* at 51 (emphases added). The Court concludes that the Counterclaim for
7 Reimbursement is not “so vague” that Plaintiff “cannot reasonably prepare a response.”
8 Fed. R. Civ. P. 12(e).

9 The Court concludes that a more definite statement is not warranted. Plaintiff’s
10 motion for a more definite statement is denied.

11 **VI. Conclusion**

12 IT IS HEREBY ORDERED that Plaintiff’s motion to dismiss pursuant to Federal
13 Rule of Civil Procedure 12(b)(6) or, in the alternative, motion for a more definite
14 statement pursuant to Federal Rule of Civil Procedure 12(e) is DENIED.

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16
17 DATED: 8/28/15



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WILLIAM Q. HAYES
United States District Judge